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SECRETARY OF THE AIR FORCE**

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Law

CIVIL LITIGATION

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This instruction sets guidelines for Air Force personnel dealing with litigation, tax disputes, and legal or administrative proceedings. It sets procedures for releasing information for use in litigation and sets in motion the procedures and service of legal process involving:

- The Air Force.
- Air Force personnel performing official duties.
- Air Force instrumentalities (including nonappropriated fund activities) in the United States and foreign countries.

This instruction directs collecting and maintaining information subject to the Privacy Act of 1974 authorized by 10 U.S.C. 8013. System of records notice F110 AF JA B, Litigation Records (Except Patents), applies.

The reporting requirements in this instruction are exempt from licensing in accordance with paragraph 2.11.8 of AFI 37-124, The Information Collections and Reports (ICR) Management Program; Controlling Internal, Public, and Interagency Air Force Information Collections.

(AFMC) This supplement expands on the guidance provided in AFI 51-301. It does not apply to Air National Guard or US Air Force Reserve units and members.

SUMMARY OF REVISIONS

This is the initial publication of AFI 51-301. It aligns with and implements AFPD 51-3 and substantially revises AFR 110-24, 10 November 1982, AFR 110-10, 12 August 1985, and AFR 110-5, 12 May 1989.

(AFMC) This supplement supersedes AFR 110-24/AFMC Sup 1, and provides updated instructions.

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Chapter 1

GENERAL PROVISIONS

1.1. Responsibilities of The Judge Advocate General (TJAG). TJAG responsibilities are as written in this instruction and must be consistent with Secretary of the Air Force Orders 111.1 and 111.5 and the provisions of the Secretary's memorandum for SAF/AA, all dated 19 Jan 93. Only TJAG and those acting on behalf of TJAG (such as the various divisions in the Air Force Legal Services Agency [AFLSA]) may perform the functions detailed in section 1.1.1. Additionally:

- Commands subordinate to HQ USAF must not initiate or take any action pertaining to these responsibilities unless TJAG specifically authorizes them.
- Commands and judge advocates should make every effort to identify causes of action in favor of the United States and promptly notify the proper division in the office of TJAG or AFLSA.

1.1.1. The Judge Advocate General:

1.1.1.1. Protects the interests of the United States Air Force in legal and administrative proceedings in the United States and foreign countries.

1.1.1.2. Maintains close liaison with the Department of Justice (DoJ) to:

- Obtain evidence to support the government's position.
- Prepare pleadings and briefs.
- Compile and evaluate evidence.
- Prepare trial and appellate presentations.

1.1.1.3. In consultation with the Office of the Air Force General Counsel (SAF/GC), makes Air Force recommendations about:

- Initiating legal actions and appeals. (Except for appeals involving Armed Services Board of Contract Appeals cases).
- Accepting proposed compromises or settlements of pending litigation or controversies.

1.1.1.4. Coordinates closely with other Department of Defense (DoD) agencies and with the General Accounting Office (GAO) in procuring evidence to support the government's position.

1.1.1.5. Negotiates and presents evidence, pleadings, and briefs to federal, state, and municipal regulatory bodies in administrative and quasijudicial proceedings.

1.1.1.6. (Added-AFMC) It is essential that HQ AFMC be kept apprised of all litigation affecting AFMC installations, programs, and personnel.

Copies of reports (without attachments) regarding any litigation must be forwarded as soon as possible to HQ AFMC/JA.

Send written communication to HQ AFMC/JA as follows:

Contract matter--AFMC/JAQ.

Patent, copyright, and trademark matter--AFMC LO/JAZ.

Environmental and land use litigation--AFMC LO/JAV.

All others--HQ AFMC/JAG.

If message or telephone notification to a HQ USAF office is required, use comparable means of notification to HQ AFMC.

1.1.2. No person on active duty with, or employed by, the Air Force may appear as an attorney or counsel for the Air Force unless the appropriate AFLSA division authorizes the attorney to appear on behalf of the Air Force before any civil court, tribunal, administrative body or government agency in the United States or in a foreign country or on behalf of individuals or business entities.

1.2. Representing the Air Force and Air Force Officials Sued in Their Official Capacities. The DoJ has the statutory responsibility to represent the Air Force and Air Force officials who are being sued in their official capacities (Title 28, U.S.C., Sections 516-519). This responsibility extends to litigation in foreign courts. (However, see Title 10, U.S.C., Section 1037 and AFI 51-706.)

1.2.1. Occasionally, this responsibility is delegated entirely to TJAG.

1.2.2. When the Attorney General is served a copy of a complaint, the DoJ formally requests that the appropriate AFLSA litigation division send a litigation report to the defense attorney.

1.2.3. Base staff judge advocates (SJAs) or other Air Force officials gather the specific information and documents to comply with such requests.

1.3. Requests by Air Force Officials for Representation by DoJ. Past or present Air Force personnel or employees who are individual defendants in civil or criminal proceedings, but which arise out of the performance of their official Air Force duties, may request representation by the DoJ (see Title 28, C.F.R., 50.15).

1.3.1. The DoJ will not defend an individual against a Federal criminal action.

1.3.2. Under certain circumstances, Air Force contractors being sued by third parties may also request government representation.

1.3.3. An individual who wants government representation:

1.3.3.1. Writes a request (see [Figure 1.1](#) for the request format) and sends it through the SJA or the official designated in paragraph [1.5](#). to the appropriate division (see [Chapter 2](#) through 7)

NOTE: Officials in the Secretariat send requests through SAF/GC..

1.3.3.2. Submits an affidavit or declaration (see [Figure 1.2](#)) showing that the matter arose out of the performance of official Air Force duties.

1.3.3.3. Submits an affidavit or declaration (see [Figure 1.3](#)) from the commander or supervisor stating that:

- He or she read the complaint and the requester's affidavit or declaration.
- The matter arose out of the performance of official Air Force duties.

1.3.4. The government is not responsible for the expenses of individuals who hire private counsel without special authorization or for any judgments made against individuals in their personal capacities.

1.4. Other Authority:

1.4.1. The general counsel, Garnishment and Litigation Division of the Defense Finance and Accounting Service (DFAS-DE/G), handles:

- All litigation involving collections of overpayments of military pay.
- Military educational expenses.

1.4.2. These offices handle all notices of garnishment for alimony and child support under 42, U.S.C., 659 for:

- Active duty, Reserve, Air National Guard (ANG), retired military members and civilian employees of appropriated fund activities: DFAS-DE/G, Denver CO 80279, (303) 370-7524 or DSN 926-7524.
- Nonappropriated fund civilian employees of Air Force base exchanges: Army and Air Force Exchange Service, Attention: GC, Dallas TX 75222-0202, (214) 330-2174 or DSN 967-2174.
- Civilian employees of all other Air Force nonappropriated fund instrumentalities: AFM-WRSA/LAW, Randolph AFB TX 78150-7000, (512) 652-6691 or DSN 487-6691.

1.4.3. See paragraph 6.6.5. for information concerning other types of notices of garnishment.

1.5. Reporting Responsibilities. The SJA of the installation or unit must comply with the reporting requirements in this instruction. If the installation or unit has no SJA:

1.5.1. The contracting office chief meets reporting requirements on all matters of contracts, subcontracts, and purchase orders.

1.5.2. The installation or unit commander meets reporting requirements on all other matters.

1.6. Disposing of Documents. Dispose of documents prepared in accordance with this instruction per AFI 37-138.

1.7. Litigation Reports. See Chapter 2 through 7 for reporting requirements when the Air Force or its instrumentalities are a defendant or Air Force officials are being personally sued for actions within their official capacity. Report new litigation by telephoning the litigation division that handles the case, then mailing or faxing written litigation report or copy of the complaint. If you have any doubt whether a particular case requires a litigation report, immediately call the appropriate office for advice before submitting a written report.

1.7.1. If you must send a formal litigation report:

1.7.1.1. Submit it in letter form to the appropriate litigation division as soon as possible after telephonic notification of the litigation.

1.7.1.2. Except for tort actions under the Federal Tort Claims Act (FTCA), send an information copy of the litigation report to the relevant major command. (See Chapter 2 for information on FTCA cases). This report gives the litigating division enough information to formulate responses to the factual allegations in the complaint.

1.7.1.3. Include a detailed statement of the relevant facts and a summary of the procedural history.

1.7.1.4. Prepare, handle and safeguard the litigation report to preserve its character as attorney work product.

1.7.1.5. Include:

- The identities of all parties to the litigation and the court or administrative forum involved.
- The case's docket number.
- The amount of damages or other relief sought.
- The nature of the litigation with a complete summary of known facts giving rise to the litigation.
- A proposed answer with detailed comments on each allegation of the pleadings.
- For lawsuits or non-Federal criminal proceedings brought against former or present Air Force personnel or employees arising from actions that reasonably appear to have been performed within the scope of their employment, describe in detail how those individuals were acting within the scope of their office or employment.
- Comments on available defenses, setoffs, cross-claims, and counter-claims.
- Details of process service and pleading suspense dates.
- Specifics of how the service was effected, on whom, and the service date.
- All documents, including envelopes.
- Any government indemnity rights, such as insurance, bonds, and guaranty agreements.
- Any previous actions on the subject matter (including administrative claim adjudications, associated claims, and previous lawsuits).
- Names, phone numbers, home of record, addresses of witnesses, and summaries of their expected testimony.

1.7.2. Attach to the report:

- A copy of each of the pleadings.
- Any requests for government representation and supporting affidavits (see paragraph 1.3, paragraph 1.3.).
- All pertinent records or documents (such as correspondence, statements of witnesses, photographs, diagrams, administrative claims files, and so on). Indicate the location and the name and address of the custodian of documents.

1.7.3. When you copy documents:

1.7.3.1. If the original file contains both legal-and letter-sized documents, prepare uniformly sized copies by reducing oversize documents to letter size. (***Note: You need not prepare uniformly sized copies for FTCA cases.*** See paragraph 2.2.3.)

1.7.3.2. Number administrative records consecutively in the lower right hand corner of the page before copying.

1.7.3.3. Bind administrative records at the top, using prong fasteners and press board covers. Where records are extensive, divide them into volumes.

1.7.3.4. To avoid authenticating documents at trial, have the records custodian certify them using AF Form 44, *Certificate of Records* (see paragraph 8.3.).

- 1.7.3.5. Base level SJA offices keep a file copy of all documentation for future reference.
- 1.7.4. If you can't send all of the requested material and still get the report in promptly:
 - 1.7.4.1. Send an interim report that includes what you have available.
 - 1.7.4.2. Explain where to find the missing material, what you are doing to preserve or obtain it, and when you will send it.
 - 1.7.4.3. If losing relevant documents might compromise the defense of the case, act immediately to prevent the routine destruction of these documents.
 - 1.7.4.4. When you obtain the material or information, send it with an amended report.
 - 1.7.4.5. If the required material is unavailable or if the litigation office can get the material from official repositories more easily than local reporting authorities could, explain why and send the report without such materials.
- 1.7.5. As soon as possible, notify appropriate officials of pending litigation and arrange to protect relevant records.
- 1.7.6. Send the litigation report to the office with responsibility for handling the case. (See **Chapter 2** through 7).

Figure 1.1. Format for a Request for Government Representation.**FORMAT FOR A REQUEST FOR GOVERNMENT REPRESENTATION**

[Date]

[Place]

Request for Government Representation

I hereby request the Attorney General of the United States to designate counsel to defend on my behalf the case of [CASE NAME, COURT, CASE NUMBER].

I recognize I may be required to pay any judgment against me. I further recognize that there is no statutory authority to pay any judgment against me out of the Treasury of the United States absent special legislation to that effect, and that representation will be governed by the Attorney General's Guidelines set forth in 28 CFR §§50.15-50.16.

[SIGNATURE]

[TYPED NAME]

Figure 1.2. Sample Declaration of Defendant.

SAMPLE DECLARATION OF DEFENDANT

(Attached to Representation Request, Figure 1.1)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

_____))
Plaintiff)
))
v.) 28 U.S.C. 1746 Declaration
))
_____))
Defendant)

I, _____, am, and at all times relevant to this case have been, a (civil service employee) (nonappropriated fund employee) (active duty military member) (a member of the Air National Guard) (a member of the Air Force Reserve) of the United States Air Force. I am presently assigned to _____, Air Force Base, _____, as a _____ (As a Federal employee, one of my responsibilities is to insure the protection of Air Force property by reporting suspected abuse of such property to the proper authorities, and to report conflicts of interest within the Defense Department). (See Exhibit ____ attached, a copy of my job description). (See Exhibit _____ a description of my Air Force Specialty Code (AFSC)).

(On _____, I made a signed sworn statement to the Air Force Office of Special Investigations (OSI) describing what I had observed and learned. I made this statement because it was my duty as a Federal employee and as a member of the Air Force to report the incidents. The OSI investigated the matter.)

(From _____ to _____, I was performing temporary duty in the Washington, D.C. area. As part of my travel orders to perform this duty, I was authorized the rental of a vehicle. (See Exhibit ____ attached, a copy of my official travel orders). I rented a (year, make and model of vehicle) from (name and location of rental agency). (See Exhibit _____, a copy of the rental contract). On _____, while proceeding from my hotel to a restaurant for dinner, I was involved in a traffic accident at (location) _____ with a person identified to me as _____.)

All of my actions in this matter were within the scope of my official Air Force duties and under color of my office as _____. I acted in the good faith belief that my actions were reasonable and in accordance with the law. (My report was based on the honest belief that these offenses had occurred and only to insure Air Force property was properly safeguarded and rules and regulations were complied with.)

I declare under penalty of perjury that the foregoing is true and correct. Signed this ____ day of _____, 19____, at _____, _____.

Figure 1.3. Sample Declaration of Supervisor.

SAMPLE DECLARATION OF SUPERVISOR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

)	
Plaintiff,)	
)	
v.)	28 U.S.C. 1746 Declaration
)	
)	
Defendant)		

I, _____, am, and at all times relevant to this case have been, the _____, at
Air Force Base, _____. As such, I am the (supervisor)(commander) of _____. I am familiar with
the allegations of the complaint in _____ v. _____.

I certify _____ was performing official Air Force duties when the events upon which the complaint is based
occurred. His/her actions were taken in the good faith belief that they were authorized, reasonable, and in accordance with
the law. (An Air Force employee is responsible for reporting all suspected incidents of theft or wrongful appropriation to
the proper authorities. Resource protection and the prevention of conflict of interest are important concerns in the Air
Force. See AFI ___, Exhibit ___, attached hereto.) (An Air Force employee on temporary duty is authorized to use a rental
vehicle in a reasonable manner to acquire meals.) All of _____'s actions with respect to this case were within the
scope of his/her Federal employment and under color of his/her office as _____.

I declare under penalty of perjury that the foregoing is true and correct. Signed this _____ day of _____ 19____, at
, _____.

Chapter 2

FEDERAL TORT CLAIMS ACT LITIGATION

2.1. Litigation Responsibility:

2.1.1. The DoJ, usually through the local US Attorney, handles tort litigation involving the US as a plaintiff or a defendant.

2.1.2. The Tort Claims and Litigation Division (AFLSA/JACT) assists the DoJ with Air Force cases involving the Federal Tort Claims Act (FTCA), and with admiralty cases. While the majority of these cases are for amounts placing jurisdiction at AFLSA/JACT level, some are local suits following denials of administrative claims at base level. Some suits may be filed six months after receiving the claim but before the claim is investigated and acted on at base or AFLSA/JACT level. In these instances, or when time limitations dictate, AFLSA/JACT may delegate the litigation responsibility to a base while retaining overall control of litigation assistance.

2.2. Handling Complaints Received at Base Level:

2.2.1. When you receive a complaint under the FTCA, immediately telephone AFLSA/JACT with:

- Names of all parties to the litigation.
- The court involved.
- The case's docket number.
- The amount of damages requested.
- The nature of the litigation.
- Complete information regarding service of process, pleading suspense dates, and any information about other government agencies involved.

2.2.2. Send the complaint to AFLSA/JACT as soon as possible.

2.2.3. If AFLSA/JACT asks you, prepare a litigation report (see paragraph 1.7.) and send it and the complete original claims file to the local defending US Attorney.

2.2.3.1. Send litigation reports to the US Attorney no later than 14 days before the answer is due.

2.2.3.2. You may send oversize documents.

2.2.3.3. At the same time, send a copy of the complete claim file, pleadings, correspondence, and the litigation report to AFLSA/JACT.

Chapter 3

LITIGATION IN DOMESTIC COURTS AND ADMINISTRATIVE AGENCIES, OTHER THAN FEDERAL TORT CLAIMS ACT CASES, CONTRACTS, BANKRUPTCY, PATENT, COPYRIGHT, TRADEMARK, AND ENVIRONMENTAL AND LAND USE CASES

Section 3A—General Information

3.1. Who Is Responsible. The General Litigation Division of the (AFLSA/JACL) protects Air Force interests in litigation covered by this chapter. Subordinate commands must give the DoJ, US Attorneys, and designated representatives in administrative proceedings the support they need to properly represent the Air Force. AFLSA/JACL litigation includes:

- Military and civilian personnel.
- Taxes.
- Utility rates.
- Constitutional and personal torts involving the FTCA.
- Privacy and Freedom of Information Acts.

3.2. Matters You Must Report. Report the matters detailed in this section to AFLSA/JACL per paragraph 1.7. When in doubt, immediately telephone AFLSA/ JACL for advice before submitting a written report.

3.2.1. Report to AFLSA/JACL:

3.2.1.1. All litigation in domestic courts involving matters per paragraph 3.1. (See sections 3B through 3G).

3.2.1.2. The issuing of any legal process affecting the Air Force mission or requiring or prohibiting action by Air Force personnel or employees in connection with the performance of their official Air Force duties such as:

- Habeas Corpus petitions.
- Temporary restraining orders.
- Subpoenas.
- Attachments.

3.2.1.3. Tax Disputes. See Section 3E..

3.2.1.4. Administrative Proceedings and Actions.

3.2.1.4.1. See Section 3C for administrative civilian personnel litigation. Report all other administrative proceedings and actions that could affect the Air Force mission to AFLSA/ JACL. *EXCEPTIONS:*

- Transportation (see AFJI 24-211, *Defense Traffic Management Regulation*).
- Utility rate changes that result in annual rate increases of less than \$150,000 per year for electrical and gas service, \$75,000 per year for water or sewage disposal service, and \$20,000 per year for telephone service. See Section 3C and Section 3E for utility rate changes that exceed these amounts.

- Pollution control, unless authorities have served a notice of violation or taken enforcement action on an Air Force installation. (See [Chapter 5](#))
- Air Installation Compatible Use Zones (AICUZ) studies, unless you expect litigation. (See [Chapter 5](#))

3.2.1.4.2. See Section 3C for specific instructions for reporting administrative proceedings on:

- Labor-management relations.
- Administrative proceedings under Title VII of the Civil Service Reform Act of 1978.

3.2.1.4.3. See paragraph [1.7](#) for the reporting format for these administrative proceedings and actions.

Section 3B—Civilian Personnel Litigation

3.3. General Information. The US Court of Federal Claims or Federal district courts hear cases brought by present or former civilian employees. These courts may permit trial de novo in Equal Employment Opportunity (EEO) cases. Most other civilian personnel cases involve appeals based wholly or in part on administrative records.

3.3.1. Civilian employees may appeal adverse decisions by the Merit Systems Protection Board (MSPB) to the Court of Appeals for the Federal Circuit.

3.3.2. The types of administrative records and litigation support at the beginning of litigation may vary widely. The litigation support requirements in paragraph [3.3.3](#) through 3.3.5. are the minimum for each type of case. AFLSA/JACL may require additional support in certain cases.

3.3.3. EEO Cases. Although employees may usually get a trial de novo, administrative records frequently play a central role in these cases. Accordingly, SJAs should promptly obtain these records from the custodian and submit five copies with a litigation report per paragraph [1.7](#).

3.3.4. MSPB Appeals. These appeals are based solely upon facts developed during MSPB administrative hearings.

3.3.4.1. The MSPB provides official copies of the record only to the DoJ, not the agency involved.

3.3.4.2. AFLSA/JACL usually encounters a lengthy delay before receiving a copy of this record.

- In these cases, SJAs must provide a detailed procedural history of the case and a description of issues raised in the administrative hearings instead of the formal litigation report.
- Refer to and attach copies of relevant documents.

3.3.5. Other Civilian Personnel Court Litigation. SJAs provide formal litigation reports with five copies of the administrative records according to paragraph [1.7](#), unless AFLSA/JACL directs otherwise.

3.4. Administrative Cases. See [Section C](#) for litigation support requirements and responsibilities for cases pending before the Merit Systems Protection Board, Federal Labor Relations Authority, or Equal Employment Opportunity Commission.

Section 3C—Administrative Actions Involving Civilian Personnel Or Labor Matters**3.5. What To Report.** You must report:

- Unfair labor practice charges and complaints.
- All representation petitions (filed by management or a union under 5 U.S.C., 7111, 7112, 7113, 7115, or 7117) whether or not the Federal Labor Relations Authority orders a hearing in the case.
- Discrimination (EEO) class action complaints, both informal and formal, report them to the Central Labor Law Office (CLLO). See the Air Force Equal Employment Opportunity instructions and guidance for reporting requirements.

3.6. How To Report:

3.6.1. Report all matters listed in paragraph 3.5. immediately by telephone to the CLLO of AFLSA/JACL. Send any unfair labor practice charges or complaints involving Air National Guard military technicians to CLLO with an information copy to the National Guard Bureau, Office of Legal Advisor (NGB/JA). Send one copy of the complete case file within one working day to both offices. **Note: Never send case files by less than first class mail.**

3.6.2. Include in a case file copies of all materials from the Federal Labor Relations Authority (FLRA).

3.6.2.1. Include in discrimination class action complaints case files copies of all filings plus any attachments.

3.6.2.2. When you notify the CLLO by telephone, provide all relevant information on the case, including:

- A summary of allegations.
- Descriptions of any supporting evidence.
- An analysis of management's perception of the issues.
- A statement of management's position on the merits of the charge or complaint and its views on the possibility of settlement.

3.6.3. As soon as possible after you notify by telephone and send the case file, send a written litigation report (see paragraph 1.7.).

3.6.3.1. Although all aspects of the litigation report requirements may not apply to administrative litigation, review each requirement.

3.6.3.2. Resolve questions as to what materials or information to include by calling the CLLO for guidance.

3.6.3.3. Send only one copy of information for administrative litigation reports. Include:

- All matters that you previously summarized orally.
- Any further information you learned or developed.
- A copy of documentary evidence.

- Statements from all management officials who know about the case. (A judge advocate or other government attorney must take such statements to protect them from compulsory discovery.)

3.6.3.4. Send the names of base personnel (judge advocates and civilian personnel officers) who are the local point of contact.

3.6.3.5. Points of contact personnel continue to advise the CLLO or NGB/JA (immediately by telephone with follow-up by mail) as further information becomes available.

3.6.4. Do not contact or interview bargaining unit employees without prior express approval of the CLLO or NGB/JA attorney for the case.

3.7. Requesting Representation and Assistance:

3.7.1. To ask for CLLO representation in EEO, MSPB, or arbitration matters, make the initial request by telephone and send the entire case file within one working day after the request. Send the litigation report (prepared according to paragraph 1.7.) as soon as possible. (See paragraph 3.6.3.)

3.7.2. CLLO provides legal advice and assistance in labor relations and other civilian personnel matters. They encourage judge advocates call the CLLO for assistance.

Section 3D—Military Personnel Litigation

3.8. General Information:

3.8.1. SJAs must provide formal litigation reports for Federal cases by active duty and reserve service members concerning administrative personnel actions (unless otherwise directed by AFLSA/JACL) if the cases affect any of these areas:

- Active duty or reserve status.
- Collateral attacks of courts-martial or other actions under the Uniform Code of Military Justice (UCMJ).
- Pay, retirement, and disability matters.

3.8.2. Such cases include:

- Administrative discharge.
- Assignments.
- Reenlistment.
- Involuntary separation.
- Active duty service commitment.
- Call to active duty.
- Dress and appearance.
- Conscientious objectors.

3.9. Temporary Restraining Order (TRO) and Habeas Corpus. Many military personnel cases involve applications for a temporary restraining order (TRO), preliminary injunction or writ of Habeas Corpus. You must immediately notify AFLSA/JACL by telephone about:

- All court applications for a TRO, preliminary injunction, or writ of Habeas Corpus.
- Any individual who threatens a lawsuit for injunctive relief or Habeas Corpus, even when that person has not yet filed suit.

3.9.1. Send a copy of the complaint or petition and any allied papers to AFLSA/JACL as quickly as possible. You must assemble all pertinent documents as quickly as possible or as directed by the responsible attorney in AFLSA/JACL. (See paragraph 1.7.2.)

3.9.2. For cases involving injunctive relief or Habeas Corpus, AFLSA/JACL sometimes permits direct contact between the office of the SJA and the US Attorney's Office. SJAs must nonetheless remember that litigation decisions and advice to the US Attorney's Office must come from AFLSA/JACL. The SJA must never agree to any form of restraints (see paragraph 1.1.). After responding expeditiously, you must prepare a formal litigation report (see paragraph 1.7.), unless AFLSA/JACL directs otherwise.

Section 3E—Tax and Utilities Litigation

3.10. Tax Disputes:

3.10.1. Whether in litigation or not, report all disputes about:

- The validity or refund of taxes against property belonging to the Air Force or its instrumentalities.
- The validity or refund of taxes against property belonging to contractors who use the property to perform their work for the Air Force or its instrumentalities.
- Taxes imposed on Air Force personnel that raise issues under Section 574, *Soldiers' and Sailors' Civil Relief Act* (Title 50, U.S.C. App., 574).

3.10.2. Report tax disputes through command channels by letter or telephone to AFLSA/JACL. In cases involving Government contractors, report disputes to SAF/GCQ. Use the format in paragraph 1.7.

3.10.3. Do not negotiate with officials of a political entity or state the Air Force's position on any tax dispute without prior authorization by AFLSA/JACL, or, in cases involving Government contractors, do not negotiate without prior authorization from SAF/GCQ.

3.11. Utility Litigation:

3.11.1. Report administrative proceedings before independent regulatory bodies for utility rate changes that could result in annual rate increases for the installation of more than:

- \$150,000 for electrical service and natural gas service.
- \$75,000 for water or sewage disposal service.
- \$20,000 for telephone service.

3.11.2. Report proceedings regarding rate schedules or other substantive issues regardless of their immediate dollar value. (***Note: Installations may elect to report rate increases other than those they must report.***)

3.11.3. Telephone or mail the report to AFLSA/JACL (ULT). Use the telephone to avoid delay in getting the information to AFLSA/JACL (ULT) and HQ CSC/JA. Use the format in paragraph 1.7.

3.11.3.1. For follow-on reporting (under AFI 32-1061) of electric, gas, water, and sewage disposal rate cases, send information copies to MAJCOM SJA offices and the base civil engineer. Base and major command judge advocate representatives should ask their civil engineering counterparts to obtain copies of civil engineering rate increase reports for AFI 32-1061.

3.11.3.2. For telephone rate cases, send information copies to the base communications officer and HQ CSC/JA.

3.11.4. The Air Force encourages judge advocates and others to contact members of the ULT for advice and assistance on utility proceedings.

Section 3F—Freedom of Information Act (FOIA) and Privacy Act (PA) Litigation

3.12. General Information. In FOIA litigation, the Government has 30 days to answer a complaint, not the normal 60-day period allowed for other litigation. (*Note: Those unfamiliar with FOIA litigation often incorrectly indicate the 60-day period on the summons.*) Prompt reporting of both PA and FOIA issues is imperative since a single complaint may include both.

3.13. Reporting Requirements. You must notify AFLSA/JACL by telephone on the duty day that you receive a complaint. Immediately send the summons, complaint, and other available materials to AFLSA/JACL by fax, Express Mail, or similar means pending the complete litigation report. Contact the appropriate US Attorney's office to verify the effective date of service and identify the Assistant US Attorney handling the case.

3.13.1. After making initial contact with AFLSA/JACL, send a formal litigation report that includes:

- A redacted and an unredacted copy of the records at issue in the litigation.
- A chronology reflecting the processing of the underlying FOIA/PA request.
- The name, address, commercial, and DSN phone numbers of the responsible FOIA/PA officer.

3.13.2. For Privacy Act lawsuits, the litigation report must include a statement indicating if the plaintiff filed a request for amendment to the record. If yes, include a copy of the request and the agency's response.

3.13.3. If the record includes photographs, send photographic prints rather than photocopies. Index and separately certify the redacted and unredacted records.

3.13.4. The record custodian should use AF Form 44.

Section 3G—Constitutional Torts and Personal Tort Suits Not Brought Under the Federal Tort Claims Act

3.14. Reporting Requirements. Whenever litigation names individual defendants who were acting within the scope of their employment, you must act quickly to process representation requests (see paragraph 1.3.) and, when necessary, to effect removal to Federal court.

3.14.1. Notify AFLSA/JACL by telephone on the duty day that you receive notice of such action:

- Send the summons, complaint, and other available materials to AFLSA/JACL by fax, Express Mail, or similar means, pending the complete litigation report.

- Send all material received by each individual, including copies and the envelope.
- Make copies for the individual.
- Contact the US Attorney's office to verify the effective date of service and identify the Assistant US Attorney handling the case.

3.14.2. Follow initial contacts with a complete litigation report. In unusual situations, after getting telephone approval by AFLSA/JACL, you may send a copy of the report directly to the Assistant US Attorney. Use the format in paragraph 1.7.

3.15. Indemnification Requests:

3.15.1. The Air Force usually cannot indemnify Air Force members or employees for any verdict, judgment, settlement, or other monetary award entered against them in their personal capacities. The Air Force considers a request for indemnification if:

- The conduct giving rise to the verdict, judgment, settlement, or award was within the member's or employee's scope of employment.
- It is in the interest of the US to indemnify the individual.

3.15.2. The Air Force member or employee seeking indemnification must submit a signed, written request to his or her servicing SJA and includes:

- Copies of all documents proving liability.
- An explanation of how the conduct that created the liability was within the requester's scope of employment or official duties.
- An explanation of how indemnification would be in the interest of the United States.
- A statement indicating if the requester has insurance or any other source of indemnification.
- This declaration:
 - "I understand that the Air Force's acceptance of this request for indemnification for processing in accordance with AFI 51-301 does not constitute an acceptance of any obligation by the Air Force to make such indemnification. Any indemnification that the Air Force might make is a permissive action taken solely in the interest of the US and not for my personal benefit."

3.15.3. Requesters must include with the request a recommendation by the servicing SJA specifically addressing each requirement of sub paragraph 3.15.2. Send the request and recommendation through SJA channels with recommendations from each level to the Chief, General Litigation Division (1501 Wilson Blvd., Arlington, VA 22209). Comments from the SJA at MAJCOM/FOA/DRU are particularly important.

3.15.4. Before forwarding a recommendation in favor of indemnification to AFLSA/JACL, the MAJCOM, FOA, or DRU SJA coordinates the recommendation with that level FM.

3.15.4.1. The Chief, General Litigation Division sends the request and recommendations, through channels, to TJAG for a decision.

3.15.4.2. If you don't have enough time to submit an indemnification request through normal channels, submit the request directly to the Chief, General Litigation Division, who coordinates with the appropriate SJAs.

3.15.5. The requester must include all documents or information necessary to process the indemnification request.

3.15.6. The MAJCOM/FOA/DRU pays indemnification from their funds unless SAF/FM decides to use other funds.

3.15.7. Indemnity decisions are final and not subject to appeal of any kind.

Chapter 4

CONTRACT LITIGATION

4.1. Contract Litigation. The contract litigation division (AFLSA/JACN) assists DoJ in handling court actions based on or relating to contracts with the Air Force or its instrumentalities, including:

- Contract claims against the Air Force in any state or Federal court.
- Actions seeking equitable relief, including temporary restraining orders and injunctions.
- Bankruptcy proceedings involving Air Force contractors.

4.1.1. The Air Force Materiel Command Directorate of Contract Appeals (AFMCLC/JAB) handles contract cases involving litigation at the Armed Services Board of Contract Appeals (ASBCA).

4.1.2. SAF/GC handles protest cases at the General Accounting Office (GAO) and at the General Services Board of Contract Appeals (GSBCA).

4.1.3. See SAFO 111.5 regarding significant cases.

4.2. Reporting Requirements. Fax or telephone AFLSA/JACN immediately when you learn of contract litigation involving or arising out of activities of the Air Force or its instrumentalities, whether or not the Air Force is a party to the litigation. Follow the initial contact with a litigation report in accordance with paragraph 1.7., unless AFLSA/JACN directs otherwise.

4.2.1. Title 28, U.S.C. 520(b) gives the information requirements for suits brought in the US Court of Federal Claims or the US Court of Appeals for the Federal Circuit on a contract, agreement, or transaction with any executive or military department. Make sure to fulfill these requirements when handling such suits. If you have any questions about including particular information, contact AFLSA/JACN immediately. *Note: You must adhere to AFLSA/JACN suspense dates to meet litigation deadlines imposed by court rules or DoJ direction.*

4.3. Third Party Litigation. Contract litigation may require complying with discovery requests for actions in which the Air Force is not a named party, such as prime contractor or subcontractor suits. These actions routinely seek information from the Air Force regarding an underlying contract.

4.3.1. Unless it appears that this action might result in liability for the Air Force, you need not prepare a litigation report.

4.3.2. Do notify AFLSA/JACN of these cases to ensure a consistent USAF response.

4.3.3. The SJA of the installation or unit or other individual responsible for litigation reporting must handle the subpoena or information request in accordance with DoD Directive 5405.2, *Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses*, and [Chapter 9](#) of this instruction.

4.4. Contract Fraud Cases.

4.4.1. SAF/GCQ assists DoJ in handling litigation, discovery, and settlement of contract fraud cases, including “qui tam” actions under the False Claims Act.

4.4.2. The responsible SJA supports SAF/GCQ as requested.

Chapter 5

ENVIRONMENTAL AND LAND USE LITIGATION

5.1. Who Is Responsible. The Environment Litigation Division (AFLSA/JACE) is primarily responsible for managing environmental and land use litigation involving the Department of the Air Force. AFLSA/JACE works closely with the DoJ and US Attorneys nationwide to deal with litigation concerning Air Force installations and various environmental protection statutes. You must report all actual or potential environmental or land use litigation to AFLSA/JACE.

5.2. Reportable Environmental and Land Use Litigation. Reportable litigation includes:

5.2.1. Suits or notices of violation that challenge or allege Air Force violation of:

- The National Environmental Policy Act (NEPA).
- The Federal Clean Air or Clean Water Acts.
- State air or water pollution statutes or regulations, including permit requirements, effluents limits, and procedural violations.

5.2.2. Suits or notices of violations alleging violation of:

- The Resource Conservation and Recovery Act (RCRA).
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).
- Other Federal or state statutes pertaining to the control, disposal, storage, or treatment of hazardous substances.

5.2.3. Suits involving:

- Historic preservation statutes.
- Endangered species protection.
- Safe drinking water statutes.
- Other environmental issues.
- Air Force land use including those based on the Federal Lands Policy and Management Act and other land use or land acquisition statutes.

5.2.4. Suits alleging or asserting:

- Inverse condemnation by Air Force activities or seeking to challenge or discredit the Air Force Air Installation Compatible Use Zone (AICUZ) Program.
- Annexation proposals by local political agencies seeking to acquire or extend jurisdiction or control over Air Force property (see paragraph 5.5.).
- Any other litigation affecting Air Force property interests. Report these actions informally to AFLSA/JACE to find out if you need to prepare a substantive, formal litigation report.

5.3. Affirmative Litigation. Although the kinds of litigation in paragraph 5.2. are mainly defensive, SJAs report potential cases in which the Air Force may want to initiate litigation or join as an intervenor or third party in litigation not directly involving the Air Force. Examples:

- Proposals to establish landfills or waterfowl habitats near operational runways that might pose a substantial bird strike hazard.
- Annexation proposals (see paragraph 5.5.).
- State regulatory activity to establish requirements that apply to Air Force installations.
- Potentially responsible parties (PRPs) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).
- Other cases in which the Air Force has an interest.

5.4. Reporting Environmental Litigation. You must immediately report by telephone any actual or possible environmental or land use litigation (including formal notices of violation) issued by any level of government.

5.4.1. Report prospective litigation promptly even if you have not received any formal complaint, process, or notice.

5.4.2. As soon as possible after notifying by telephone, the base SJA should prepare a formal litigation report, in accordance with paragraph 1.7.

5.4.3. In addition to other materials required under paragraph 1.7., provide the following:

- three copies of state or local statutes alleged to have been violated.
- five copies of relevant environmental discharge permits.
- five copies of an installation or area map, with annotations showing pollution control facilities, construction sites, discharge points, easements, or other relevant features.
- five copies of any draft or final Environmental Impact Statement or assessment.
- As many copies of all records pertaining to the litigation, such as correspondence, records, photography, or reports, as the particular case may require. AFLSA/JACE determines the quantity of such documents in each case.

5.5. Annexation Proposals:

5.5.1. DoDD 4165.6, 22 December 1976, IV, B contains DoD policy on annexations of military installations by local communities or political entities. This directive states:

"It is the policy of the DoD not to oppose annexation by a municipality or political subdivision in accordance with state law except in those cases where the Secretary of the Military Department concerned determines that such action would not be in the best interest of the Federal Government or if the annexation is opposed by another political subdivision."

5.5.2. The base SJA sends a report analyzing the potential impact of a proposed annexation that specifically addresses the impact of annexation on the right of the base to contract for utility and waste disposal services to AFLSA/JACE. **Figure 5.1.** outlines the information that usually applies to an annexation proceeding.

Figure 5.1. Outline of Information Regarding Annexation Proposals.**1. Outline of Factors Bearing on Proposed Annexation.**

- a. Impact on the mission:
 - (1) Impact on AICUZ or other land compatible use requirements.
 - (2) Future base expansion requirements.
 - (3) Pollution standards, ordinances, and codes.
- b. Impact on operational and maintenance costs:
 - (1) Water and sewer rates.
 - (2) Electric and gas rates.
 - (3) Telecommunications and other rates.
 - (4) Franchise taxes.
 - (5) Taxes on US contractors (including license fees, gross receipts taxes, personal property taxes, etc.) likely to be passed on to the US.
 - (6) Regulatory ordinances, building codes, etc. (fees or noncompliance penalties).
- c. Potential public relations impacts (pro and con).
- d. Impact upon military and civilian personnel:
 - (1) Taxes (personal property, income, employment).
 - (2) Licensing requirements.
 - (3) Changes in school districts.
 - (4) Taxes on base exchange concessionaires.
 - (5) Telephone rates.
 - (6) Automobile insurance rates.
 - (7) Benefits derived from increased city revenue (use of libraries, parks, and so on).
- e. Potential city services to be obtained:
 - (1) Police and fire prevention (conflicts with present agreements).
 - (2) Trash and garbage removal.
 - (3) Snow removal and street maintenance.
- f. Advantages or benefits to accrue to the annexing jurisdiction:
 - (1) Revenue sharing (other Federal rights).
 - (2) Conformity with city plan (growth pattern maintenance).
 - (3) Impact on other political jurisdictions nature and reason for opposition of others.
- g. Impact on other political jurisdictions - nature and reason for opposition of others.
- h. Degree of legislative jurisdiction exercised by the United States over the area to be annexed.

2. Remarks and Recommendations.**3. Memorandum of State Annexation Law:**

- a. Criteria and standards.

- b. Annexation procedure.
- c. Right of and forums for protest.
- d. Unique status afforded United States as landowner (if any).
- e. Other relevant laws or ordinances.

Chapter 6

CIVIL LITIGATION IN FOREIGN COURTS

6.1. Litigation Responsibility. The International and Operational Law Division (HQ USAF/JAI) monitors foreign civil litigation involving the Air Force, its instrumentalities, and its officials, and supports the DoJ in its efforts to protect Air Force interests in foreign courts. Send foreign civil litigation reports per paragraph 6.2. to HQ USAF/JAI.

6.2. Reporting Requirements. Report the following types of foreign suits, actions or disputes to HQ USAF/JAI using the format in paragraph 1.7.

6.2.1. Proceedings involving Air Force activities or personnel.

6.2.2. Proceedings in which the United States has an interest but is not a named party defendant (i.e., obligation under international agreement to share the expense of any judgment awarded).

6.2.3. Disputes concerning the validity or refund of taxes assessed by a foreign authority against the property or transactions of the Air Force, its contractors or instrumentalities, including nonappropriated fund activities.

6.2.4. Legal actions arising out of Air Force contracts, subcontracts and purchase orders, bankruptcy, receivership, assignment, and probate proceedings that affect the interests of the United States.

6.2.5. Proceedings involving proposed new or amended administrative rules or regulations of a foreign government or agency that may affect the Air Force mission.

6.2.6. Legal process of foreign courts affecting the Air Force mission or that require Air Force personnel to take official actions.

6.3. Reporting Methods:

6.3.1. Electronic Reporting. The reporting authority submits an initial message or fax to HQ USAF/JAI, with an information copy to the major command, immediately on receiving notice of the start of a foreign suit, action, or proceeding that requires reporting. (see paragraph 6.2.). This initial report precedes the formal litigation report (see paragraph 1.7.) and explains the subject of the action.

6.3.2. Confirming Letter. Reporting authorities confirm each electronic message by sending a letter (see paragraph 6.4.). Attach 2 legible copies of each legal document, memorandum, and letter that applies to the foreign suit, action, or proceeding.

6.3.3. Litigation Report. Send the litigation reports immediately following initial notification to allow time for other government departments to comment or act before issuing instructions on how to defend civil cases that arise in foreign jurisdictions.

6.4. Report Contents. Include in each report:

- All information per paragraph 1.7.
- A recommendation on which qualified local counsel (preferably bilingual) to handle the case. Choose a counsel from the list of attorneys maintained by the nearest US embassy or consulate.

6.5. Follow-up Action:

- 6.5.1. Advise HQ USAF/JAI fully and promptly of all later developments.
- 6.5.2. Send HQ USAF/JAI two copies of all pertinent correspondence and documents.
- 6.5.3. Send information copies to the major command (see paragraph 6.3.).

6.6. Commencement of Proceedings:

6.6.1. Foreign Jurisdiction. The defense of sovereign immunity as a bar to the jurisdiction of a foreign court is proper only when the United States or one of its agencies or instrumentalities is a named party defendant, and in such event may be asserted only with the prior approval of the DoJ and TJAG.

6.6.2. Suits Against the United States. Send to the SJA any writ, summons, notice of legal proceedings, or other foreign civil process delivered to an Air Force officer, employee, or activity immediately on receipt.

6.6.2.1. The SJA then returns the document to the issuing authority, with a suitable statement respectfully and tactfully explaining the lack of authority of the person or activity to accept service on behalf of the United States, and suggesting that service or delivery be made on the US Embassy or diplomatic mission through established channels.

6.6.2.2. No exceptions to this procedure exist except with prior approval from TJAG and clearance from the chief of the US diplomatic mission in the country. (See [Figure 6.1.](#) for a model letter returning such a process).

6.6.2.3. Refer questions concerning this policy to HQ USAF/JAI.

6.6.3. Suits Against United States Government Agencies and Instrumentalities.

6.6.3.1. US Government agencies and instrumentalities in foreign countries such as military units and installations, base exchanges, open messes, and military missions lack judicial personality under United States law. Such government activities of the United States generally are not subject to civil proceedings or service of process in foreign countries. Claims nominally against such activities are in law claims against the United States.

6.6.3.2. Except for proceedings against US personnel arising out of performance of official duties, the United States is the only party proper defendant or respondent in any foreign civil proceedings.

6.6.3.3. The US embassy or diplomatic mission in that country is the only United States activity that may receive and accept service of foreign process. Such service is normally done through diplomatic channels.

6.6.3.4. In suits against US Government agencies and instrumentalities, the SJA returns the foreign process to the issuing authority with a suitable statement respectfully and tactfully explaining the lack of juridical personality on the part of the US Government agency or instrumentality involved. (See [Figure 6.1.](#) for model letter returning process).

6.6.4. Suits Against Individuals Acting in an Official Capacity.

6.6.4.1. These guidelines apply to civil suits, actions, and proceedings in foreign countries against individual members or employees of the Air Force for acts or omissions arising out of the performance of their official duties.

6.6.4.2. The guidelines on returning process to issuing authorities does not apply if TJAG decides that applying it is inconsistent with pertinent provisions of a status of forces or similar agreement, or that applying it may adversely affect the defense of such suits in that country.

6.6.4.3. When a process on its face establishes that the act or omission complained of is patently a governmental act:

6.6.4.3.1. Return it to the issuing authorities with a letter signed by the SJA explaining that the act or omission complained of was performed by the subject while acting as an official of the Air Force or an agency of the US Government, and in the performance of official duties under superior orders.

6.6.4.3.2. Further state that in legal effect the subject is not the proper party defendant. The letter should not contain any express statement that suit should be brought against the United States as this is an improper invitation of suits against the United States.

6.6.4.4. When a process does not on its face establish that the act was governmental:

6.6.4.4.1. Return it with a similar letter of explanation to that described above.

6.6.4.4.2. Attach a certified statement from the commander attesting to the employment or military status of the individual and indicating that the individual was performing official duties at the time and place when the alleged act occurred.

6.6.4.4.3. If the issuing authority rejects the return of process:

6.6.4.4.3.1. Allow the service of the process according to applicable international agreement and local law and procedures.

6.6.4.4.3.1.1. If proper service is obtained, the defendant must defend the suit, and the defendant must prove during the trial that the occurrence was part of his or her official duties.

6.6.5. Garnishment and Attachment Proceedings. As a general rule, the United States and its agencies and instrumentalities are not subject to garnishment orders or money attachment proceedings in foreign countries aimed at wages or other funds due and payable by the United States to alleged or adjudicated debtors of the parties on whose behalf garnishment or attachment is attempted.

6.6.5.1. An exception to this rule exists in the Federal Republic of Germany. Under Article 34(3), German Supplementary Agreement to the NATO Status of Forces Agreement, the United States must (see Public Law 93-647) honor writs of garnishment issued by German courts against members of US forces or civilian component stationed in the Federal Republic of Germany for child support or alimony obligations. Consult the DoD *Military Pay and Allowances Entitlements Manual*, paragraph 70710.

6.6.5.2. In all other cases the United States cannot honor garnishment orders or money attachments. You may cooperate with the foreign judicial and administrative authorities, and advise of the date, time, and place of payment to the debtor. The creditor can exercise legal rights directly against the debtor without submitting the United States or its activities to the jurisdiction of the foreign court or agency. Upon receipt of any writ, order, or petition for garnishment or money attachment served on, or otherwise delivered to an Air Force officer, employee, or activity refer such document to the SJA.

6.6.5.3. If the United States cannot honor the garnishment or money attachment request, the SJA returns it to the issuing authority.

6.6.5.3.1. The SJA advises the foreign court or other agency that the US military authorities will cooperate with the local authorities to allow the creditor to pursue remedies under local law directly against the debtor. (See [Figure 6.1](#) for a model letter.)

6.6.5.3.2. If the debtor is a United States citizen or resident alien, release only information authorized under the Privacy Act (see AFI 37-132).

6.6.5.3.3. Send full electronics report of each case immediately to HQ USAF/JAI.

6.6.5.4. If the United States can honor the garnishment or money attachment request, the MAJ-COM SJA will implement procedures for processing such requests. Send a full report of each case immediately to HQ USAF/JAI.

6.7. Defending Against Foreign Suits and Proceedings:

6.7.1. The DoJ prosecutes and defends in all foreign courts for all civil suits by or against:

- The United States.
- US agencies.
- US instrumentalities.
- Officials and employees whose official conduct is involved.

The information contained in reports made under this chapter constitutes the basis for a report by HQ USAF to the DoJ and for an Air Force recommendation to that Department as to the action to be taken in the case. The DoJ, in turn, takes action to ensure that steps are taken to institute or defend the suit.

6.7.2. Government Representation of an Individual. The DoJ represents military personnel and civilian employees of the Air Force being sued in foreign courts because of actions they took in the line of duty in the performance of their official duties.

6.7.2.1. The DoJ decides for each case if it will provide representation or permit the Air Force to do so.

6.7.2.2. Submit requests for government representation in foreign courts (see paragraph [1.3](#).) in writing through HQ USAF/JAI.

6.7.2.3. The government does not pay for private counsel that individuals hire without specific authorization and will not pay any judgment against the individual (see paragraph [3.15](#).).

6.7.3. Government Representation of an Air Force Contractor. If an Air Force contractor requests government representation before a foreign civil court, the contractor's official representative must sign DoJ Form 399, *Acknowledgment of Conditions of Department Representation*, and follow the procedures in paragraph [1.3](#).

6.7.4. Obtaining a Continuance. If the date set for a hearing does not allow enough time to retain government counsel, the SJA attempts to get a continuance.

6.7.4.1. In attempting to obtain such continuance, the SJA does not appear in court or do anything else that can be construed as a defense or a legal appearance.

6.7.4.2. Advise HQ USAF/JAI electronically of all such attempts.

6.7.5. Cooperating with Foreign Counsel. SJAs give information and evidence to foreign counsel that the DoJ retains to represent US interests.

6.7.6. Communicating with the DoJ. The DoJ retains, instructs, and pays foreign counsel.

6.7.6.1. The retained counsel keeps in touch with the DoJ.

6.7.6.2. SJAs may not communicate directly with the DoJ without TJAG's prior approval.

6.7.7. Handling Administrative Legal Problems in Civil Litigation. Do not consult with foreign counsel retained by the DoJ on administrative legal problems collateral to the civil litigation. When the local SJA cannot resolve such problems, refer them to the next higher command.

6.8. Suing in a Foreign Court. The United States may:

- Sue for money damages.
- Petition for injunctive relief.
- Sue for the return of personal or real property.
- Sue for the specific performance of a contract.

6.8.1. The DoJ prosecutes civil suits for the United States.

6.8.1.1. Quickly identify the basis for any legal action

6.8.1.2. Notify HQ USAF/JAI promptly.

6.8.2. If a contractor is facing criminal proceedings based on an activity or transaction for which the United States may sue in civil court, notify HQ USAF/JAI immediately. When such action serves the interest of the United States, the DoJ can intervene as a complainant in the criminal case.

6.8.3. After you identify a wrong and deem action proper, alert the DoJ immediately by message to HQ USAF/JAI. Include:

- A description of the facts of the case.
- A discussion of the local law that applies to the dispute.
- An analysis of why a suit is appropriate.
- Date at which the applicable statute of limitations will run.
- Amount of claim or relief sought.
- Nature of anticipated defenses or counterclaims.
- Other interested parties or possible intervenors.
- Efforts made to collect the debt or seek other relief before filing suit.
- Recommendation for selection of local counsel, with cost and fee estimate.
- Statement of availability of witnesses and evidence.

Figure 6.1. Format for Letter Returning Foreign Process and Tendering Assistance in Garnishment and Attachment Proceedings.

FORMAT FOR LETTER RETURNING FOREIGN PROCESS AND TENDERING ASSISTANCE IN GARNISHMENT AND ATTACHMENT PROCEEDINGS

SUBJECT: (Identification of process)

TO: (Court or other authority from which process issued)

1. Enclosed is the (identification of process) which was delivered by (mode of delivery, for example, mail or personal tender) to (individual or unit by which process was received) at (place of delivery) on (date of delivery).
2. Under the law of the United States, the (unit or activity to which process is directed) is a government agency or instrumentality that possesses no independent juridical personality, and thus is not itself amenable to civil process. The claim asserted in the present proceeding is a claim against the United States, and the only agency empowered to receive service of foreign process in such cases is the United States Embassy or Diplomatic Mission within the country concerned. Usually, service of process upon the Embassy or Diplomatic Mission is accomplished through diplomatic channels.
3. Although circumstances outlined above require the return of this (identification of process), and without prejudice to the immunities enjoyed by the United States as sovereign, I can furnish you the date, time, and place of payments to be made to the debtor so that the creditor may pursue remedies under local law directly against the debtor. In this regard, the sum of (amount of payment, expressed in local currency) will be paid to (name of debtor) at (place of payment) on (date of payment) at (time of payment). (If the debtor is an employee, include statement of future payment schedule.)

Chapter 7

PATENT, COPYRIGHT, AND TRADEMARK LITIGATION

7.1. Litigation Responsibility. The Patents Division (AFLSA/ JACP).

- Assists the DoJ in patent, copyright, trademark, or related litigation that involves the Air Force.
- Maintains liaison with the DoJ and other governmental agencies on such litigation.

7.1.1. Report all prospective litigation involving patent, copyright, trademark, and related matters affecting the Air Force to AFLSA/JACP.

7.1.2. Direct all questions regarding litigation of these cases to AFLSA/JACP.

7.2. Responding to Calls, Interrogatories, Court Orders, and Requests:. AFLSA/JACP:

- Responds to calls by the Attorney General to the Secretary of the Air Force for information and help according to 28 U.S.C. 520, to defend the US in patent, copyright, trademark, and related litigation.
- Responds to court calls, court orders, interrogatories, and so on.
- Provides any necessary additional information and assistance to the DoJ.

7.3. Obtaining Information and Documents for Responses:

7.3.1. AFLSA/JACP may request Air Force activities to provide information and documents to the DoJ and the courts.

7.3.2. When an Air Force activity receives such a request, it should immediately provide the information and documents and any other pertinent facts.

7.3.3. The activity must meet any set time limits or send an interim report to AFLSA/JACP in sufficient time for the DoJ to request an extension of time from the court.

7.3.4. The request to the Air Force activity usually specifies the purpose and type of information and materials required.

7.3.5. When responding to calls from the Attorney General, the Air Force activity:

7.3.5.1. Identifies all items or processes manufactured by or for the government that might fall under the terms of the charge of infringement.

7.3.5.2. Includes the name and address of the contractor or subcontractor.

7.3.5.3. Includes specific contract information including the contract date under which all disputed items were procured.

7.3.5.4. Provides copies of the patent indemnity, notice and assistance, and authorization and consent clauses in the contracts and pertinent subcontracts.

7.3.5.5. Indicates the number, date of delivery, unit cost, and total cost of all involved items.

7.3.5.6. Attaches drawings, descriptions, diagrams, photographs, manuals, and so on that contain data pertaining to the alleged infringement.

7.3.5.7. Describes any government rights under the patent, copyright, or trademark due to work the plaintiff performed under government contracts.

7.3.5.8. Includes the names and addresses of officers and employees of the Air Force who know pertinent engineering and procurement facts and who could consult with the DoJ attorney and testify for the government.

7.3.5.9. Identifies any other Air Force activities that might have an interest in the matter .

7.3.5.10. Includes additional information on defenses available to the United States, particularly as they pertain to the validity of the patent, copyright, or trademark.

7.3.5.11. Provides two copies (or whatever number of copies is specified) of all attachments to the response.

Chapter 8

AUTHENTICATING OFFICIAL AIR FORCE RECORDS FOR ADMISSION INTO EVIDENCE

8.1. Terms:

8.1.1. Official Air Force Records. All documents, records, or papers which are required by the Department of the Air Force to be prepared or processed and retained.

8.1.2. Custodian. A person in charge of an office in which official Air Force records are filed by law, regulation, or custom, or a person which proper authority so designates; and for certain purposes, a person who has physical possession of official Air Force records for use in official duties.

8.2. Rules of Evidence. The rules of evidence at common law and various statutes specify how to authenticate documents and records for use as evidence. Methods include:

- Oral testimony.
- Authenticated copies of public records.
- Other authorized methods. The method of authenticating official Air Force records this chapter provides does not prevent proof of genuineness by any other authorized method.

8.3. Authenticating Official Records. Custodians must authenticate official Air Force records.

8.3.1. Civilian Judicial or Quasi-Judicial Proceedings:

8.3.1.1. An official Air Force record or an entry in it may be evidenced by an official publication thereof in the *Federal Register* or the record custodian may authenticate a copy and certify that he or she has lawful custody of that record.

- Use AF Form 44, *Certificate of Records*, to authenticate official Air Force records and copies or extracts from them.
- Prepare the first certificate (the top part of AF Form 44) and forward it to the HQ USAF or AFLSA division handling the case together with the documents being authenticated. (See figure 8.1.).
- Submit only the copies that have been requested for certification.

8.3.1.2. Charge individuals who are not from Federal agencies requesting documents for:

- Search time.
- Document reproduction.
- Certifying, and validating the document.

8.3.1.3. See AFPAM 37-145 for the fees that apply.

8.3.1.4. Send a letter to the appropriate HQ USAF or AFLSA office indicating that you:

- Billed the requester, and
- When records are subject to the Privacy Act, state that you worked within the guidelines of the Privacy Act, 5 U.S.C. 552a and your basis for releasing the records.

8.3.1.5. The Secretary of the Air Force or designee signs under the second certificate (the bottom part of the form) and affixes the Air Force seal to the AF Form 44. This procedure satisfies Rule

44, Federal Rules of Civil Procedure, for admitting official Air Force records as evidence and usually satisfies state jurisdiction requirements too.

8.3.2. Getting Assistance from the SJA. Custodians of official Air Force records should consult their SJA or the responsible AFLSA/JAC litigation division on preparing AF Form 44.

8.3.3. Voluminous Records. Divide voluminous records at logical points and put a covering AF Form 44 on each section.

8.3.4. Freedom of Information Act, Privacy Act, and **Chapter 9**. When releasing official Air Force records to other than Federal agencies, ensure the material is releasable under the Freedom of Information Act, 5 U.S.C. 552, that the privacy of individuals, under the requirements of the Privacy Act, 5 U.S.C. 552a, has been satisfied, and **Chapter 9** of this instruction has been followed. When responding to requests from other Federal agencies, do not violate the Privacy Act, 5 U.S.C. 552a, and systems notices made pursuant to the Privacy Act.

8.4. Offering Records into Evidence:

8.4.1. Do not offer official Air Force records physically into evidence unless they can be withdrawn and a copy substituted for the original. Copies of Air Force records, authenticated as provided in this chapter, are usually admissible in evidence instead of the actual records.

8.4.2. If the custodian of official Air Force records certifies that after diligent search no record or entry of a specified matter exists in the records of his or her office, that certificate is admissible as evidence of such fact.

8.4.2.1. See the attachment for instructions and exact wording to use when you cannot find records.

8.4.2.2. Forward AF Form 44 for completion.

Chapter 9

RELEASING INFORMATION IN LITIGATION, TESTIFYING, AND SERVING ON STATE AND LOCAL JURIES.

Section 9A—Releasing Information in Litigation and Testimony by Current and Former Air Force Personnel as Witnesses

9.1. Applicability and Scope:

9.1.1. EXCEPTIONS. This chapter does *not* apply to releasing official information or testimony by Air Force personnel:

9.1.1.1. Before courts-martial convened by military departments or in administrative proceedings conducted by or on behalf of a DoD component.

9.1.1.2. In administrative proceedings for:

- The Equal Employment Opportunity Commission.
- The Merit Systems Protection Board.
- The Federal Labor Relations Authority.
- A negotiated grievance procedure under a collective bargaining agreement to which the government is a party.

9.1.1.3. To the Defense Industrial Personnel Security Clearance Review Program under DoD Directive 5220.6.

9.1.1.4. Disclosing information to Federal, state, and local prosecuting and law enforcement authorities for use in a criminal investigation by a DoD organization.

9.1.2. This instruction does not preclude applying AFI 37-132 to any written request for agency records that is not in the nature of a legal process.

9.1.3. This chapter does not supersede or modify:

- Existing laws or Air Force programs governing the testimony of Air Force personnel.
- The release of official Air Force information during grand jury proceedings.
- The release of official information not involved in litigation.
- The release of official information under the Freedom of Information Act, Title 5, U.S.C. 552, the Privacy Act, Title 5, U.S.C. 552a, or the Federal Service Labor-Management Relations Statute, Title 5, U.S.C. 7114(b)(4).

9.1.4. This Chapter does not infringe on or displace the responsibilities of the DoJ to litigate on behalf of the United States.

9.2. Terms:

9.2.1. Air Force Personnel includes:

- Present and former US Air Force military personnel.
- US Air Force Academy cadets.

- Present and former civilian employees of the Air Force, including:
 - Nonappropriated fund activity employees.
 - Non-US nationals who perform services overseas under status of forces agreements.
 - Other specific individuals hired through contractual agreements by or on behalf of the Department of the Air Force.

9.2.2. Demand. Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, to produce, disclose, or release official Air Force information or which require that Air Force personnel testify or appear as witnesses.

9.2.3. Judicial Proceeding. Any action, suit, or other judicial proceeding, including condemnation, preliminary, informational, or other proceedings of a judicial nature. Examples of the latter include:

- Hearings and conferences before a committing court, magistrate, or commission.
- Grand jury proceedings.
- Coroners' inquests.
- Informational proceedings such as hearings and conferences conducted by a prosecuting attorney to determine whether an information or charge should be made in a particular case. The judicial proceeding may be in the District of Columbia, a state, territory, or possession of the United States, including the Commonwealth of Puerto Rico; areas and installations in the Republic of Panama made available to the United States under the Panama Canal Act of 1977 and related agreements (as described in Section 4(a) of the Panama Canal Act of 1979); or the Trust Territory of the Pacific Islands.

9.2.4. Litigation. All pretrial, trial, and post trial stages of actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards, or other tribunals, foreign and domestic. This includes:

- Responses to discovery requests, depositions, and other pretrial proceedings
- Responses to formal or informal requests by attorneys or others in litigation matters.

9.2.5. Official Information. All information of any kind, however stored, that is in the custody and control of the Department of the Air Force, relates to information in the custody and control of the Department, or was acquired by Air Force personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the US Air Force.

9.2.6. Private Litigation. Litigation in which the United States is not a party and in which it has no identifiable direct or indirect interest in the outcome.

9.3. Releasing Official Information. Custodians and potential witnesses consult the SJA, HQ USAF/JAI, or the responsible AFLSA/JAC litigation division before:

- Releasing official information.
- Meeting requests by individuals for witness testimony or interviews.

NOTE: Secretariat personnel should consult with SAF/GC.

9.3. (AFMC) Forward a copy of all requests for Air Force personnel to appear as witnesses and demands for release of official information to HQ AFMC/JA. When such a request or demand is referred to HQ

USAF or AFLSA under this instruction, provide an information copy of the referral to HQ AFMC/JA. When a report or notification to HQ USAF or AFLSA is required under this instruction, provide an information copy to HQ AFMC/JA.

9.3.1. HQ USAF/JAI or the responsible AFLSA/JAC litigation division releases all official information which could be used in a claim or litigation against the United States. Requesters must state in writing the nature and relevance of the official information they want and include as much detail as possible. The SJA or other responsible authority uses this information to evaluate the request in light of DoDD 5405.2 (32 C.F.R., Part 97) and *United States, ex rel. Touhy v. Ragan*, 340 U.S. 462 (1951).

9.3.2. HQ USAF/JAI or the appropriate division of AFLSA/JAC consults with DoJ litigation attorneys per DoDD 5405.2, unless that responsibility is delegated to the SJA.

9.3.2.1. HQ USAF/JAI or the appropriate division of AFLSA/JAC, in coordination with DoJ litigation attorneys, decides if Air Force personnel may appear and testify as witnesses in contemplated or pending litigation, and what conditions to impose on such release, appearance, or contact.

9.3.3. Do not release classified official information to courts or unauthorized persons under any circumstances, unless proper authority first declassifies the material.

9.3.3.1. When requesters ask for classified information that authorities cannot declassify at lower levels, notify HQ USAF/JAI or the appropriate division of AFLSA/JAC.

9.3.3.2. Pending a final decision, the person who receives the request or demand furnishes the requester, court, or other authority with a copy of Title 32, C.F.R., Part 97 (DoD Directive 5405.2) and this chapter and informs the requester that the request is under review. Try to obtain a stay of the request or demand pending a final determination.

9.4. Factors in Releasing Official Information or Testimony. Before releasing official information or testimony, consider these questions:

9.4.1. Is the demand unduly burdensome or otherwise irrelevant?

9.4.2. Does the request specify remedial information that is inadmissible under the rules of evidence, or is the information otherwise inappropriate under the applicable court rules?

9.4.3. Would disclosing this information (including release in camera) be appropriate under the rules of procedure governing the case and under the relevant substantive law concerning privilege?

9.4.4. Would disclosing the information violate any statute, executive order, regulation, or directive? Release documents subject to the Privacy Act only with consent of the individual or under a court order or subpoena specifically signed by a judge of a court of competent jurisdiction.

9.4.5. Would disclosing the information, except in camera to assert a claim of privilege, reveal classified information under the DoD Information Security Program? (Such material includes all data under DoD 5200-1-R/AFI 31-401, unclassified technical data withheld from public release pursuant to DoD Directive 5230.25, contents of limited-use safety mishap investigation reports conducted under AFI 91-204 and restricted from public release by DoD Instruction 6055.7, or other matters exempt from unrestricted disclosure.)

9.4.6. Would disclosure interfere with ongoing enforcement proceedings, compromise Constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or

similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances?

9.5. Limitations After the Testimony of DoD Personnel Is Approved. Except under court order, by a court of competent jurisdiction, DoD personnel may produce, disclose, release, comment upon, or testify concerning only those matters that the requester specifies in writing and which the Air Force approves.

9.5.1. DoD employee personnel do not give opinion or expert testimony without specific approval (see paragraph 9.19.).

9.6. Fees. Persons releasing copies of records and other documentary material collect fees from the requester according to the fee schedule in AFI 37-131 or 32 C.F.R. 97. 6(d).

9.7. Sending Requests. When an SJA requests a decision on releasing official information from HQ USAF/JAI or AFLSA/JACL, JACN, JACT, JACE, or JACP, provide this information if you can obtain it readily:

- Name of litigation and parties.
- Name and location of the court or tribunal.
- Date the litigation began and date of requested appearance.
- Name and address of requester and of party who has the requested official information.
- Type of action, subject matter, and a statement of the relevancy of the requested information.
- Copies of documents requested, or a complete description of them if they are bulky or numerous.
- Recommendations on release and any other pertinent information.

9.8. Requests for Depositions or Statements. You may grant requests or demands by parties to prospective or actual private litigation for statements or depositions from Air Force personnel about their official duties (not expert testimony) as long as you follow the guidelines in this chapter.

9.8.1. Prospective witnesses must consult with the SJA before providing statements or releasing official information to parties involved in private litigation.

9.8.2. Statements and depositions are voluntary with the individual concerned, unless required by valid legal process or the order of competent military authority.

9.8.3. For cases in which the United States is a party, follow the guidelines in paragraph 9.3. or 9.11.

9.9. Authenticating Documents. Authenticate official Air Force documents for civil litigation, rather than requiring the custodian to personally appear and testify. The authentication procedure in **Chapter 8** meets the requirements of Federal courts and of most state courts and administrative bodies. Use the simplest authentication procedure permissible.

9.10. Releasing Official Information to DoJ. The DoJ and its US attorneys represent the government's interest in judicial proceedings involving the Air Force.

9.10.1. Release unclassified official information that is not privileged to the DoJ or the US attorney on request.

9.10.2. Send requests for classified information that cannot be declassified at lower levels, or for other privileged official information, to HQ USAF/JAI or the responsible AFLSA/JAC litigation division for a decision.

9.11. Litigation Before the Armed Services Board of Contract Appeals. Contracting officers may allow individuals to use official information in litigation before the Armed Services Board of Contract Appeals per the Federal Acquisition Regulation (FAR), subpart 5.4.; and applicable DoD directives and Air Force instructions. Coordinate responses to such requests with the assigned trial attorney at the AFM-CLC/JAB, Wright-Patterson AFB OH 45433-5000.

9.12. Complying With Subpoenas.

9.12.1. SJAs give legal advice to Air Force personnel under subpoena to appear and testify concerning official information.

9.12.1.1. When this chapter prohibits releasing the subpoenaed information, the person receiving the subpoena appears and explains the matter to the court or to the attorney requesting the deposition.

9.12.1.2. If the court or requesting attorney is not satisfied and persists in requesting the information, the witness respectfully asks for time to send the request to HQ USAF/JAI or the appropriate AFLSA/JAC litigation division for decision.

9.12.1.3. Judge advocates may accompany and advise the witness concerning a problem on release of official information.

9.12.2. When a subpoena calls for classified or otherwise unreleasable information, SJAs may:

- Communicate with the counsel requesting the subpoena.
- Explain the restrictions on release.
- Give the attorney releasable information.
- Suggest withdrawing the subpoena.

9.12.3. Promptly report any subpoenas from foreign courts requiring records, files, or documents to HQ USAF/JAI.

9.13. Witnesses in Private Litigation:

9.13.1. Air Force personnel may appear and testify in their nonofficial capacity in private litigation in which the United States has no interest if:

- This chapter does not prohibit releasing the requested information.
- The government incurs no expense.

9.13.2. Except as noted below, Air Force personnel testifying in their nonofficial capacity in private litigation may do so only in a nonduty status. EXCEPTIONS:

- Commanders may grant a leave or pass to Air Force military personnel.
- Air Force civilian personnel may be absent to testify while on annual leave or leave without pay.
- Air Force civilian personnel are entitled to court leave.

9.13.3. Air Force personnel testifying in private litigation in their official capacity are in a duty status.

9.13.3.1. The Air Force allows travel and transportation costs only to the extent authorized by the Joint Travel Regulations (JTR).

9.13.3.2. The witness must turn over all payment by requester for attendance and expenses to the accounting and finance office.

9.14. Witnesses in Civilian Criminal Proceedings:

9.14.1. Air Force military personnel under subpoena to appear and testify in state criminal proceedings that do not directly involve the Air Force or its interests may receive permissive temporary duty per AFI 36-3003, at no expense to the government.

9.14.2. Military personnel returning from an overseas area to appear as a witness may use space available military transportation per DoD Directive 4515.13.

9.14.3. Air Force military personnel who must appear and testify in criminal proceedings in which the Air Force has a direct, strong interest may receive a temporary duty status per JTR, paragraph U7062.

9.14.3.1. Installations receiving such requests should report the request to AFLSA/JACL.

9.14.3.2. In addition to those items in paragraph 9.7., the report should include these items of information:

- If defendants or victims are military members or associated with the military community.
- If the crime occurred on a military installation.
- If military personnel helped investigate or referred the matter to state officials for prosecution.
- Recommendations whether to grant temporary duty travel.
 - AFLSA/JACL approves any temporary duty travel for such witnesses.
 - The unit issuing orders pays travel expenses.

9.15. Witnesses in Litigation Involving the United States:

9.15.1. When DoJ attorneys, including US attorneys and DoJ counsel request witnesses, honor the request if the appearance requires no temporary duty. Advise HQ USAF/JAI or AFLSA/JACL, JACN, JACT, JACC, JACE, or JACP of all such requests.

9.15.2. When DoJ attorneys request witnesses and the appearance requires temporary duty, the attorney must request the witness directly through the DoJ Management Division's Special Authorizations Unit to ensure proper funding according to Title 28, C.F.R. 21.1. AFLSA/JACL or JACT directs travel.

9.15.3. In hospital recovery litigation, honor requests by counsel when the request requires no temporary duty. Otherwise, comply with AFI 51-501.

9.15.4. When DoJ foreign counsel request witnesses in foreign litigation and the request requires temporary duty, refer the request to HQ USAF/JAI.

9.15.5. When a private party in litigation with the United States requests or subpoenas Air Force personnel to testify, promptly report it to the SJA.

9.15.5.1. Before the witness testifies, the SJA advises HQ USAF/JAI or AFLSA/JACL, JACN, JACT, JACE, or JACP.

9.15.5.2. When the Armed Services Board of Contract Appeal requests or subpoenas Air Force personnel to testify, report it to the AFMCLC/JAB, Wright-Patterson AFB OH 45433-5000.

9.15.5.3. Air Force military personnel testifying in a nonofficial capacity are in a nonduty status while appearing and testifying.

9.15.5.4. Air Force civilian personnel testifying in a judicial proceeding in a nonofficial capacity receive court leave per 5 U.S.C. 6322 and AFI 177-104.

9.16. Travel Expenses for Witnesses:

9.16.1. 28 U.S.C. 1821 and the JTR govern travel allowances for Air Force personnel appearing as witnesses in litigation.

9.16.2. JTR paragraphs U7060 and U7061 apply to military personnel, and JTR paragraph C4504 applies to Air Force civilian personnel employed by appropriated fund activities.

9.16.3. The Air Force pays travel expenses for Air Force personnel assigned to Air Force activities who are appearing as witnesses for the United States. The unit issuing orders funds travel.

9.16.4. Air Force personnel appearing as necessary witnesses for a party asserting the government's claim for medical care expenses are witnesses for the United States if the government's claim is large enough to justify the expenditure.

9.16.5. When Air Force personnel appear as witnesses for the United States, but the Air Force is not involved in the litigation, AFLSA/JACL, or JACT (in cases arising under AFI 51-501), instructs the unit issuing the orders on how to obtain travel reimbursement.

9.16.6. When Air Force military personnel are under subpoena to appear as witnesses for a committee of the Congress, private individual, or a corporation, they do not receive any allowances for travel from the Air Force. The party requesting testimony arranges payment in advance.

9.16.7. When Air Force civilian personnel employed by appropriated fund activities must testify in their official capacity or produce official records on behalf of a party other than the United States, the other party pays allowable travel expenses.

9.16.8. Since trials are frequently postponed or canceled after a witness receives orders, a witness must not begin travel (except when common carrier scheduling requires it) more than 1 day before the date on which the witness must report to the requesting US attorney. Similarly, witnesses may not take temporary duty leave immediately before testifying.

9.16.9. Civilian employees under subpoena to testify in civilian criminal proceedings or on behalf of a private party in connection with any judicial proceeding to which the US, state, or local government is a party, may receive court leave per 5 U.S.C. 6322. They may not receive government travel expenses.

9.16.10. Witnesses frequently receive payment (witness fee) for testifying and reimbursement for expenses. Air Force personnel on active duty and civilians on court leave must turn in any witness fees to their accounting and finance office.

9.16.10.1. They may keep any reimbursements that they receive from a court or party, unless they are on temporary duty and are receiving government travel expenses, in which case they must turn in reimbursements to their accounting and finance office.

9.17. Travel of Witnesses to Overseas Areas. Report requests for travel of witnesses to overseas areas to testify in foreign criminal cases to HQ USAF/JAI.

9.17.1. The Air Force does not usually fund such travel.

9.17.2. You must prove that the trip serves official purposes.

9.17.3. The requesting command usually funds necessary official travel of witnesses in foreign criminal courts.

9.18. Appearing at State or Local Legislative Hearings. Air Force personnel appearing or testifying, personally or in writing, before state and local legislative bodies for the Air Force on legislative issues must obtain prior approval from HQ USAF/JAG.

9.18.1. Submit approval requests through command channels. Detail the proposed testimony. HQ USAF/JAG normally approves this type of request only:

- To serve a significant Air Force interest.
- When no conflict of interest exists.

9.18.2. Unless serving an Air Force or DoD objective, the witness and the legislative body pay the expenses.

9.19. Expert or Opinion Testimony of Air Force Personnel:

9.19.1. Air Force personnel do not provide opinion or expert testimony concerning official Air Force or DoD information, subjects, or activities, except on behalf of the United States or for a party that DoJ represents.

9.19.1.1. Under unique circumstances and when testimony will not adversely affect the interests of the Air Force or the US, AFLSA/JACL may grant special authorization for Air Force personnel to appear and testify as an expert witness in private litigation at no expense to the US.

9.19.1.2. If, despite a negative final determination by AFLSA/JACL, authorities order Air Force personnel to appear and testify, notify AFLSA/JACL.

9.19.1.2.1. If AFLSA/JACL decides not to seek further legal review or challenge to the court's order, Air Force personnel comply.

9.19.1.2.2. Air Force may direct Air Force personnel not to testify, in which case affected Air Force personnel must respectfully decline to comply with the demand. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

9.19.1.3. The Air Force must maintain strict impartiality in private litigation. If Air Force personnel provide expert or opinion testimony in private litigation, testimony frequently requires dis-

cussing their current position and duty experience. This can easily create the impression that the Air Force favors a particular finding, even though it has no official interest in the outcome of the litigation. Furthermore, testimony interferes with the normal functions of Air Force personnel.

9.19.2. Civilian counsel who want Air Force personnel to give expert or opinion testimony submit requests to the servicing SJA.

9.19.2.1. The SJA reviews the request and sends it with a recommendation for approval or disapproval to AFLSA/JACL for final decision.

9.19.2.2. The request should include:

- Name of litigation and parties.
- Name and location of the court or tribunal.
- Date the litigation began and date of the requested appearance.
- Party for whom the request is made.
- Name, grade, position, and organization of witness.
- Type of action, subject matter, and nature of testimony.
- Detailed statement showing why the Air Force should grant an exception.

9.19.3. Air Force personnel in nonofficial capacity may not provide expert review of evidence in private litigation where one of the parties in the litigation may request expert or opinion testimony from Air Force personnel.

9.19.3.1. SJAs will keep Air Force personnel aware of this provision.

9.19.3.2. After receiving approval of AFLSA/JACL to testify as an expert, Air Force personnel may then engage in such expert review.

9.19.4. The Air Force does not usually consider testimony by a treating physician as expert or opinion testimony. A treating physician may testify as to his examination, treatment, and prognosis for a patient.

9.20. Expert or Opinion Testimony and Releasing Official Information by Former Air Force Personnel.

9.20.1. Former Air Force personnel may not provide expert or opinion testimony adverse to the United States in a matter in which they had a direct involvement while employed by the government or serving on active duty.

9.20.2. Former Air Force personnel may not release classified or otherwise privileged official DoD information without the approval of AFLSA/JACL.

9.20.3. Former Air Force personnel should seek the advice of an SJA before releasing other official DoD information.

Section 9B—Serving on State and Local Juries by Members of the Air Force

9.21. Terms:

9.21.1. State. Includes the 50 United States, US Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

9.21.2. Active Duty. Full-time duty in the active military service of the United States. Includes:

- Full-time training duty.
- Annual training duty.
- Active duty for training.
- Attending a service school while on active military service.

9.21.3. Operating Forces. Forces whose primary missions are participating in and supporting combat.

9.22. Delegated Authority. Under 10 U.S.C. 982, Air Force members are exempt from jury duty when such duty unreasonably interferes with their military duties or adversely affects the readiness of a unit, command, or activity. The Secretary of the Air Force has delegated the authority to determine such exemptions to commanders.

9.23. Obtaining an Exemption From Jury Duty:

9.23.1. All general officers, commanders, operating forces personnel in training, and personnel stationed outside the US are exempt from serving on a state or local jury.

9.23.2. Other Air Force members on active duty get an exemption from jury duty if the commander decides such jury duty would:

- Interfere unreasonably with the member's military duties.
- Adversely affect the readiness of the unit, command, or activity to which the member is assigned. The decision of the special court-martial convening authority acting as the designee of the Secretary is final.

9.24. Procedures Regarding Jury Duty. When an Air Force member on active duty receives a summons to state or local jury duty, the member immediately informs his or her immediate commander.

9.24.1. If the member is exempt under paragraph **9.23.1.**, the immediate commander or designee notifies the issuing state or local official.

9.24.2. If the member is not exempt under paragraph **9.23.1.**, the immediate commander decides if the exemption under paragraph **9.23.2.** applies. If the immediate commander decides that exemption is inappropriate, the member must serve jury duty.

9.24.3. If the immediate commander first decides to exempt the member under paragraph **9.23.2.**, the immediate commander obtains a final decision or exemption from the special court-martial convening authority, who makes the decision using the criteria in paragraph **9.23.2.**

9.24.3.1. The special court-martial convening authority may decide that:

- Exemption is inappropriate and instructs the member to comply with the jury duty summons.
- Exemption is appropriate and tells the immediate commander to send a written notice of the exemption to the issuing state or local official.

9.24.4. Include these items of information in a written notice of exemption:

"(Grade and Name), a member of the United States Air Force on active duty, has been summoned to perform jury duty (when, where, and on what jury). Under 10 U.S.C. 982, DoDD 5525.8, and Air Force Instruction 51-301, this member has been determined by the Secretary of the Air Force or an authorized designee as exempt from duty on the jury in question because such jury service would unreasonably interfere with the performance of the member's military duties or would adversely affect the readiness of the unit, command, or activity to which the member is assigned. Under 10 U.S.C. 982(b), this determination is conclusive."

9.24.5. Do not charge jury duty service against leave or deduct pay or entitlements for the period of service.

9.24.6. All fees to members for jury service are payable to the US Treasury.

9.24.7. Members may receive reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty, such as transportation costs or parking fees.

NOLAN SKLUTE, Maj General, USAF
The Judge Advocate General